

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE:

B-220665

DATE: February 18, 1986

MATTER OF:

Wespercorp, Inc.

DIGEST:

1. A small business concern that does not participate in the Small Business Administration's program under section 8(a) of the Small Business Act is an interested party to protest another firm's eligibility where the 8(a) subcontract was awarded on a sole-source basis and the protester will be able to compete if its protest is sustained and the reprocurement is not restricted to participants in the 8(a) program.
2. Protest issues based upon the terms of a contract are untimely where the protester received a copy of the contract more than 10 days before the protest was filed.
3. The General Accounting Office does not consider protests concerning awards under section 8(a) of the Small Business Act absent a showing of possible fraud or bad faith on the part of government officials or an allegation that the Small Business Administration violated its own regulations.
4. Protester has not established that a subcontract awarded to a section 8(a) firm was fraudulent or made in bad faith where, more than 5 months after award, the firm was found to have been ineligible at the time of award and no evidence is presented to show that agency officials were or should have been aware of the ineligibility at that time.

Wespercorp, Inc. protests the award of letter contract No. DTFA01-85-Y-01001 by the Small Business Administration (SBA) to Amex Systems, Inc. The contract, for the design,

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development, production, and installation of 372 automated weather observing systems required by the Federal Aviation Administration (FAA), was awarded under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982). Under this section, government agencies contract with the SBA, which in turn subcontracts for performance by socially and economically disadvantaged small businesses. Wespercorp contends that Amex was not eligible for the 8(a) program at the time of award and that there were a number of other irregularities in the procurement.

We dismiss the protest in part and deny it in part.

Background

The contract, awarded on October 15, 1984, provided for the work to be performed in three phases. The first phase is for design and development on a cost-plus-fixed-fee basis. The remaining two phases are to be definitized on a fixed-price basis through negotiations between the FAA and Amex. On October 16, 1984, Amex "graduated" from the section 8(a) program, and on November 27, Allied Bendix Corporation acquired the firm.

On April 24, 1985, the SBA Acting Associate Administrator for Minority Small Business and Capital Ownership Development reconsidered the previous eligibility of Amex to receive section 8(a) contracts in light of an August 19, 1984 Memorandum of Understanding between Amex and Allied. The agreement provided for Amex, its shareholders, and Allied to negotiate in good faith toward a merger of the firms. The SBA concluded that the Memorandum of Understanding constituted an "agreement in principle" to merge, and that subsequently Amex was not independently operated and was affiliated with Allied. As a result, on the date of the agreement, Amex exceeded the applicable size limit for its type of business, and thereafter it was not eligible for participation in the section 8(a) program. See 13 C.F.R. § 124.1-1(c)(1) (1985).

The Acting Associate Administrator held that all section 8(a) contract awards to Amex after August 19, 1984 were improper. SBA wrote each agency with which it had section 8(a) contracts that had been subcontracted to Amex, stating that those executed after August 19 were voidable at the agency's discretion and that any further contract actions involving Amex (such as definitizing letter

contracts, executing modifications, and exercising options) would have to be made under the agency's own contracting authority.

Amex appealed the Acting Associate Administrator's finding to the SBA Office of Hearings and Appeals. The firm withdrew the appeal on October 29, 1985, pursuant to an agreement with the SBA that stated that the SBA found no evidence that Amex had acted in other than good faith. The SBA also withdrew a number of contracts, including the FAA contract at issue here, from the list of those that it considered voidable.

Wespercorp initially protested to our Office on grounds that the award to Amex was a subterfuge to avoid competition and constituted fraud or bad faith on behalf of the FAA. In support of its allegation of bad faith, Wespercorp asserted that (1) the contract was awarded less than a day before Amex "graduated" from the section 8(a) program and shortly before purchase of the company by Allied, and (2) although the SBA found that Amex had not been eligible for the contract at the time of award, FAA rather than terminating the contract, doubled the funds available for performance of the first phase. The protester also stated that it had been informed that the Federal Bureau of Investigation was investigating the award to Amex and that an FAA post-award survey had determined that Amex could not adequately perform the contract. At a bid protest conference on December 4, 1985, Wespercorp raised a number of additional issues based upon the provisions of the Amex contract, contending that the award to Amex violated procurement regulations governing the use of letter contracts, multi-year contracts, and the acquisition of major systems.

Preliminary Issues

The FAA raises several preliminary matters. Under our Bid Protest Regulations, a party must be "interested" before we will consider its protest. 4 C.F.R. § 21.1(a) (1985). The agency contends that while Wespercorp is a small business concern, the firm does not participate in the section 8(a) program and, consequently, is not an interested party. In support of its argument, the FAA cites Kentucky Building Maintenance, Inc., B-196368, Jan. 16, 1980, 80-1 CPD ¶ 49, in which we held that a large business was not an interested party to protest the cancellation of a solicitation that had been set aside exclusively for competition among small business concerns.

An interested party is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. 4 C.F.R. § 21.0(a). Wespercorp believes that it will be able to compete for the contract if we sustain its protest and if the reprocurment is either unrestricted or set aside for small business. We cannot say that Wespercorp is wrong. The SBA did not seek competition from section 8(a) concerns; it negotiated a contract exclusively with Amex. Thus, unlike the large business protester in Kentucky Building Maintenance, whose complaint concerned a procurement set aside for competition among small businesses, Wespercorp here is not outside a class of prospective competitors, since it is not clear that the FAA would continue to seek performance from a section 8(a) concern if we find the contract with Amex improper. Consequently, we consider Wespercorp to be an interested party for purposes of questioning whether the contract was properly awarded to Amex as a section 8(a) concern. See ABC Management Services, Inc., 55 Comp. Gen. 397 (1975), 75-2 CPD ¶ 245.

The FAA also argues that the protest is untimely because the Amex contract and the SBA's April 24, 1985 size determination are public documents that were available to Wespercorp when issued. Wespercorp contends that it did not learn that the SBA had found Amex to be other than a small business until a few days before its protest to our Office. We resolve doubt about the timeliness of a protest in favor of the protester. Weardco Constr. Corp., B-210259, Sept. 2, 1983, 83-2 CPD ¶ 296. While the SBA finding may have been available to a requesting party, we are not aware of any notification such as publication in the Federal Register by which Wespercorp should have known of the SBA's finding. We consider the protest regarding the section 8(a) eligibility of Amex to be timely.

We agree with FAA that the protest issues that Wespercorp first raised during the bid protest conference are untimely. The procurement record contains a letter from the FAA to counsel for Wespercorp stating that, in response to a Freedom of Information Act request, a copy of the Amex contract was furnished on October 18, 1985. Wespercorp did not raise the issues based upon the terms of the contract until more than 6 weeks later, well beyond the 10 days required by our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2). Wespercorp argues that the issues based upon the terms of the Amex contract should be considered

under the significant issue provision of our timeliness rules. 4 C.F.R. § 21.2(c). However, these bases for protest concern only one contract and, in our opinion, do not warrant involving the significant issue provision. See Professional Review of Florida, Inc., et al., B-215303.3 et al., Apr. 5, 1985, 85-1 CPD ¶ 394. Consequently, we dismiss the additional bases of protest.

Eligibility of Amex

As noted above, section 8(a) of the Small Business Act authorizes the SBA to enter into contracts with any government agency and to arrange for the performance of the contracts by letting subcontracts to socially and economically disadvantaged small business concerns. The contracting officer is authorized "in his discretion" to contract with the SBA upon such terms and conditions as may be agreed upon. Hence, we do not review decisions to effect procurements under the 8(a) program, and we do not consider protests of 8(a) awards absent a showing of possible fraud or bad faith on the part of government officials or an allegation that regulations have been violated. Atlantic Petroleum Corp., B-215472.2, Apr. 12, 1985, 85-1 CPD ¶ 417. Because Wespercorp's initial submission to this Office made a showing of possible bad faith, we considered the protest on the merits. However, we find that the firm has not substantiated its charge.

Wespercorp generally alleges that the award to Amex resulted from fraud and bad faith, but the firm cites as evidence only the SBA finding that Amex was not a small business concern after August 19, 1984. There is no evidence that the Amex agreement with Allied was known to either the SBA or the FAA before contract award. The procurement record contradicts any assertion that the decision to contract with Amex was based upon plans for an Amex merger with Allied. The SBA reported to the FAA on April 26, 1984, long before the August 19 agreement with Allied, that it had selected Amex for the FAA's requirement for automated weather observing systems. In a letter to the SBA dated August 8, again before the Amex-Allied agreement, the FAA stated that it planned to contract with Amex and inquired as to the effect of the firm's forthcoming graduation from the section 8(a) program on the proposed contract.

Further, we do not consider the FAA's failure to terminate the contract with Amex to be evidence of bad faith. The general rule is that an SBA determination

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that a firm was not small at the time of award has only prospective application. See Computer Data Systems, Inc., 61 Comp. Gen. 79 (1981), 81-2 CPD ¶ 393. Here the SBA concluded that the Amex contract could be terminated by the FAA, but that the agency was not required to terminate. Thus, the FAA had the discretion to continue the contract, and we cannot say that its determination to do so was unreasonable.

In sum, we find no evidence in the procurement record filed in this protest to substantiate Wespercorp's allegations that the award to Amex resulted from fraud or bad faith.

We deny the protest in part and dismiss it in part.

for Layman Efron
Harry R. Van Cleve
General Counsel